Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1998

JOHN MICHAEL BATES,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

Petition For A Writ Of Certiorari
To The Arkansas Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Was evidence seized as a result of a warrantless traffic stop introduced in violation of the Fourth Amendment?

2. Was the Fourteenth Amendment Due Process Clause violated in that no rational trier of fact could have found guilt beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

The Petitioner John Michael Bates is a citizen of the state of Arkansas. The Respondent is the State of Arkansas.

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Petitioner, John Michael Bates, petitions for a writ of certiorari to review the September 23, 1998, Opinion of the Arkansas Court of Appeals which affirmed the conviction of felonious possession of methamphetamine, Circuit Court of Fulton County, Arkansas, November 12, 1997. John Michael Bates was convicted of felonious possession of methamphetamine and also misdemeanor possession of marijuana. He was fined $10,000 by the jury with respect to the methamphetamine conviction and was sentenced by the jury to 45 days imprisonment with a $1,000 fine as to the misdemeanor marijuana conviction.

OPINIONS BELOW

The Opinion of the Arkansas Court of Appeals of September 23, 1998, is not published. A copy is attached as Appendix A. There is no trial court opinion in this matter.

JURISDICTION

This Petition seeks review of an Opinion entered by the Arkansas Court of Appeals of September 23, 1998. Petitioner seeks to invoke the jurisdiction of this Court to review this Opinion pursuant to 28 U.S.C. § 1257. Under Arkansas law, the Arkansas Court of Appeals is the state court of last resort in this matter.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

One issue in this application for writ of certiorari involves the Fourth Amendment, Appendix B, and both issues involve the Due Process Clause of the Fourteenth Amendment. See Appendix C.

STATEMENT OF THE CASE

A. *Procedural Posture*:

On August 8, 1996, an information was filed in Fulton County, Arkansas Circuit Court against John Michael Bates charging him with possession of a controlled substance with intent to deliver, methamphetamine, and possession of a controlled substance, marijuana, on or about August 4, 1996, as a result of a traffic stop in Fulton County, Arkansas.

Pretrial the defense moved to suppress the methamphetamine and the marijuana and all other derivative evidence on the grounds that the stopping of the U-Haul truck was illegal and without warrant or probable cause. The testimony pretrial and at trial showed that the U-Haul truck was in fact stopped based on suspicion and nothing more. There was no "reasonable suspicion" or probable cause and, therefore, the mere stopping of the U-Haul truck was illegal and the seizure of the methamphetamine and marijuana thereafter as alleged was a product of the unlawful stop and a violation of the Fourth Amendment and applicable provision of the Arkansas State Constitution. However, the defendant not only contended that the initial stopping of the U-Haul truck was illegal, but also the resultant pat-down search of Bates, detention, etc. This motion was denied after evidentiary hearing May 15, 1997, and at trial the jury, October 20, 1997, convicted him of possession of methamphetamine and sentenced him to a fine of $10,000 and also convicted him of possession of marijuana and sentenced him to 45 days in jail and a fine of $1,000. On November 12, 1997, judgment was entered by the Trial Judge and a notice of appeal was timely filed.

On appeal, September 23, 1998, the Arkansas Court of Appeals affirmed the convictions.

B. *Facts*:

On August 4, 1996,, at about 2 o'clock a.m., John Michael Bates was arrested after the U-Haul truck he was operating was stopped by law enforcement officers in Fulton County, Arkansas. The truck was stopped upon mere suspicion. Bates was searched and allegedly a very small amount of methamphetamine in two small vials inside a small zippered pouch was upon his person in the pocket of his shorts which was seized. A very small amount of marijuana was also allegedly seized. The proof at trial failed to establish that the methamphetamine alleged seized was the same as the methamphetamine as analyzed by a chemist in the Little Rock State Crime Lab. The chain of custody as to the marijuana was also not shown. The amount of alleged methamphetamine was not established as "usable," there was no evidence of the weight of the methamphetamine in the substance, assuming *arguendo* it was the same methamphetamine substance.

ARGUMENT

THE FOURTH AMENDMENT VIOLATION

Petitioner asserts that the Fourth Amendment was violated as applicable by way of the Fourteenth as a result of the traffic stop and subsequent searches.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In *Carroll v. United States*, 267 U.S. 132, 153 (1925), the Supreme Court established an "exigency" exception to the warrant requirement for moving vehicles based on their

inherent mobility. Under *Carroll*, a warrantless search of an automobile based upon probable cause to believe that the vehicle contained evidence of crime did not contravene the Warrant Clause of the Fourth Amendment. See *California v. Acevedo*, 500 U.S. 565 (1991) (reviewing history of the "automobile exception"). The seventy three years since *Carroll* have witnessed an expansion of police power to stop car drivers and search cars on less than probable cause. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court began to delineate and legitimate police-citizen stop-and-frisk encounters based on something less than probable cause, i.e., reasonable suspicion of crime (hereinafter "RS"). The *Terry* analysis has been adapted to the range of cases arising from police encounters with people in cars, and to the increasing volume of car traffic in drugs, guns, and money.

Traffic Stops Based on Reasonable Suspicion

Reasonable Suspicion Defined.

The police may stop a car and question the motorist based on reasonable suspicion that the person detained was, is, or will be engaged in criminal activity, or that evidence of a crime will be found. See *Berkemer v. McCarty*, 468 U.S. 420 (1984) (analogizing routine traffic stops to pedestrian stop-and-frisk activity pursuant to *Terry)*. Reasonable suspicion (RS) is not readily reduced to verbal formula; rather, it requires a case-by-case, and even, "frame-by-frame" analysis of the facts of each police-citizen encounter. The most common definitions of reasonable suspicion are negative: reasonable suspicion is something less than probable cause, which is itself defined as a "fair probability that evidence of a crime will be found." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). Reasonable suspicion is

something less than proof of wrongdoing by a preponderance of the evidence. *INS v. Delgado*, 466 U.S. 210 (1984). However, reasonable suspicion is something more than a mere "hunch" or "unparticularized suspicion" of criminal activity. *Terry*, *supra*.

The governing rule is "reasonableness" to justify incremental police intrusions into private liberty. Accordingly, courts sustain evidence from car investigative detentions and seizures where the police officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion." Terry, 392 U.S. at 21. "Reasonableness" is determined from the totality of the circumstances, *Sokolow*, 490 U.S. at 8, and from the collective knowledge of the officers involved in the stop. See *United States v. Williams*, 876 F.2d 1521, 1524 (11th Cir. 1989).

Though reasonable suspicion (RS) is a highly pliable concept, the police do not yet have a free floating right, based on their "war on drugs" or their own safety, to stop and question or "frisk" vehicles or persons based on hunches or minimal suspicion of crime. The cases are litigated, where possible, at the threshold of seizure, i.e., to show that the police lacked the requisite level of articulable suspicion, and hence that the stop of a car (and subsequent seizure of evidence) was invalid at its outset.

THE UNLAWFUL STOP OF PETITIONER'S VEHICLE

A seizure occurs whenever a vehicle is stopped. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The Fourth Amendment applies. *Id.* A brief investigatory stop of a vehicle is also a seizure of the person of the occupants. *United States v. Cortez*, 449 U.S. 411, 417 (1981). See, also,

United States v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993); *United States v. Bloomfield*, 40 F.3d 910, 916 (8th Cir. 1994). There must be *reasonable suspicion* to justify an investigatory stop of a vehicle. *Delaware v. Prouse*, *supra*, at 661, 663.

The *Terry* rationale allows police to stop a moving vehicle based on a reasonable suspicion that its occupants are violating the law. *United States v. Diaz-Lizaraza*, 989 F.2d 1216, 1220 (11th Cir. 1993). There must be a "reasonable, articulable suspicion" that the person has been, is, or is about to be engaged in criminal activity. *United States v. Thomas*, 992 F.2d 201, 203 (8th Cir. 1993). See, also, *United States v. Braggs*, 23 F.3d 1047, 1049 (6th Cir. 1994); *United States v. Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994); *United States v. Halls*, 40 F.3d 275, 276 (8th Cir. 1994). There was no "reasonable suspicion" to stop Petitioner's vehicle and, therefore, the seizure was in violation of the Fourth Amendment applicable to the states via the Fourteenth Amendment Due Process Clause. The evidence (methamphetamine and marijuana) seized was obtained illegally and should have been suppressed and all fruits thereof.

THE ILLEGAL DETENTION OF THE OCCUPANTS OF THE DEFENDANT'S VEHICLE AFTER THE STOP

Additional questioning that goes beyond the original purpose of the stop must be supported by *additional* reasonable suspicion. *United States v. Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994); *United States v. Bloomfield*, *supra*, at 918. See *United States v. White*, 42 F.3d 457, 460 (6th Cir. 1994) and *United States v. Ramos*, 20 F.3d 348, 352 (8th Cir. 1994).

There were no facts or circumstances to justify under the Fourth Amendment detaining the Petitioner Bates and the other occupants after the initial conversation and investigation.

THE ILLEGAL PAT DOWN-SEARCH OF THE PERSON OF EACH DEFENDANT

The stop and frisk exceptions are products of *Terry v. Ohio* (1968) *supra*, and *Sibron v. New York*, 392 U.S. 40 (1968). A stop is a seizure of the person. A frisk is a search of the person. Because both of these lesser intrusions infringe sufficiently on a citizen's right not to be stopped and not to be frisked, they fall within the coverage of the Fourth Amendment and must be reasonable to be permitted. Because, however, they are less intrusive than full-blown seizures and searches of the person, they may be deemed reasonable upon predicates less substantial than that of probable cause. The newly articulated (less substantial) predicate is now called "articulable suspicion": sometimes, good cause to believe; sometimes reasonable suspicion; and, sometimes, particularized suspicion.

Although the stop and the frisk require the same *quantitative* justification of articulable suspicion, they require different *qualitative* justifications. Because the governmental purpose of the stop is crime-related, the predicate for a stop must be articulable suspicion that (1) a crime has occurred; or (2) is then occurring; or (3) is about to occur. Because the governmental purpose of the frisk, however, is to protect the life and limb of the stopping officer, the predicate for the frisk is articulable suspicion that the person stopped may be armed.

The scope limitation on the stop is that it remain right at the spot or within very close proximity to where the stop

first occurred. The temporal scope limitation is that the stop only last a little while. The scope limitation on the frisk is that it be confined to the pat-down of the clothing surface of the person being frisked. That is all that is required to detect the presence of offensive weapons. That is all that is necessary, therefore, to serve the purpose of the frisk.

Minnesota v. Dickerson, 508 U.S. 366 (1993) recognized, by way of analogy to the Plain View Doctrine, the concept of a plain feel doctrine. [Its rationale seemingly would expand *Coolidge*'s second requirement to embrace all of the senses and not merely that of sight.]

Thus the police may take only reasonable actions to protect themselves assuming *arguendo* a lawful stop and detention. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977): officer may order driver to get out of vehicle without violation of the Fourth Amendment. They may check for weapons. *United States v. Thomas*, *supra*, at 203-204. They may order occupants out using drawn weapons when those actions are reasonably necessary. *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993). The test for the scope of the activity is whether the surrounding circumstances give rise to a justifiable fear for personal safety. *Id.* They may frisk for weapons depending on the circumstances. *United States v. Colin*, 928 F.2d 676, 678 (5th Cir. 1991). See, also, *United States v. Cochran*, 939 F.2d 337, 339 (6th Cir. 1991).

Each case turns on its unique facts. *United States v. Watts*, 7 F.3d 122, 125 (8th Cir. 1993). Limited intrusion depending on the circumstances are reasonable. *Adams v. Williams*, 407 U.S. 143, 148 (1972); see, also, *New York v. Class*, 475 U.S. 106, 116 (1986). If an arrest procedure is

initiated prematurely, going beyond what was necessary to protect the officer's safety, the seizure is unreasonable and in violation of the Fourth Amendment. *United States v. King*, 990 F.2d 1552, 1563 (10th Cir. 1993). The interior compartments of the vehicle can be searched if the officers have a reasonable suspicion that it contains weapons dangerous to the officers. *Michigan v. Long*, 463 U.S. 1032, 1034-35 (1983) There must be specific and articulable facts in support of a reasonable belief that the suspect is dangerous. *United States v. Gleason*, 25 F.3d 605, 608 (8th Cir. 1994); *United States v. Watts*, 7 F.3d 122, 125 (8th Cir. 1993).

However, an overly intrusive stop may constitute an arrest requiring probable cause. See *United States v. Sharpe*, 470 U.S. 675, 686, 688 (1985).

SCOPE OF A TERRY FRISK

Any "frisk" was unlawful. Any alleged items seized should be suppressed.

The authority to frisk a suspect has been limited to the situations where "officers reasonably" believe that the suspect is armed. Self-defense is the rationale of the *Terry* stop and the most compelling justification. *United States v. DeBerry*, 76 F.3d 884 (7th Cir. 1996). See, also, *United States v. Padro*, 52 F.3d 120 (6th Cir. 1995). The frisk must target weapons only. See *United States v. Ponce*, 8 F.3d 989, 999 (5th Cir. 1993) and *United States v. Gibson*, 19 F.3d 1449, 1451 (D.C. Cir. 1994). In *Minnesota v. Dickerson*, 508 U.S. 366 (1993):

> The purpose of this limited search is *not to discover evidence of crime*, but to allow the officer to pursue his investigation without fear of violence. ... (citations omitted). Rather, a protective search -- permitted

without a warrant and on the basis of reasonable suspicion less than probable cause -- must be *strictly limited to that which is necessary for the discover of weapons* which might be used to harm the officer or others nearby. (citations omitted). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. (citations omitted) (emphasis added).

In creating what has been termed the "plain-feel" doctrine, the Supreme Court held in *Dickerson* that an officer who conducts a pat-down search that stays within the parameters marked by *Terry* may seize non-threatening contraband as long as the identity of that contraband is immediately apparent to the officer without conducting some further search of the object. Drawing from the "plain-view" cases, the *Dickerson* court further defined the limits of its decision by reminding that police may seize contraband in plain view only when doing so does not intrude into anyone's privacy any more than the police are already authorized to do:

> If, however, the police lack probable cause to believe that an object in plain view is contraband without conducing *some further search of the object* ... the plain-view doctrine cannot justify its seizure.
>
> *Id.* 113 S.Ct. 2137 (emphasis added)

The *Dickerson* court suppressed the contraband seized from the defendant, holding that the police officer overstepped the bounds of a search for weapons allowed under *Terry* by squeezing and manipulating a lump in the suspect's pocket prior to determining that it was contraband. See, also, *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (applying

Dickerson, the court suppressed the money found in a brown paper bag seized from Schiavo holding that the officer's continued exploration of the bag went beyond that allowed in *Terry* because the incriminating nature of the bulge was not immediately apparent.)

One court applying *Dickerson* expressed its skepticism of police testimony on this point. In *United States v. Fernandez*, (S.D.N.Y Aug. 16, 1996), the district judge suppressed drug evidence seized during a *Terry* frisk. The officer testified that as he frisked the suspect and tapped on the suspect's pocket, he heard a "plasticky" crinkling sound. The officer questioned the suspect about it and, according to the officer, the suspect replied that it was "weed." Impressed by defense counsel's successful "impeachment by omission" and impeachment with a prior inconsistent statement in the officers' report, the district judge found the police officer's testimony "unconvincing"!! The district judge suppressed the drug evidence, concluding that the officer had no reasonable suspicion, much less probably cause, to believe that the object in the suspect's pocket was contraband.

When officers come upon an opaque container in the course of an investigatory stop, a warrant may be required before officers may invade the privacy of the package (e.g., Bates's small zippered pouch in his pocket). This principle

follows from *United States v. Jacobsen*,[1] 104 S.Ct. 1652 (1984), in which the Court wrote:

> Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.
>
> Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.
>
> *Id.* (emphasis added)

A recent decision by the court of criminal appeals in Alabama applied the analysis articulated by the Supreme Court in *Jacobsen*: *Seely v. State*, 669 So.2d 209 (Ala. Cr. App. 1995), With the factual situation being almost identical to that in *Jacobsen* -- the decisive exception that the Federal Express employees in *Seely* did not open the tube -- the *Seely* court held that the search by police officers was unreasonable and in violation of the Fourth Amendment. Focusing on an officer's (Ware) action in cutting open the package, the court explained:

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[1]. In *Jacobsen*, Federal Express employees opened a damaged package and found plastic bags of white powder inside. They notified the Drug Enforcement Administration. Responding to the call, a DEA agent field tested the powder which tested positive for cocaine and the defendant was subsequently arrested. *Id.*at 1655. Although the Supreme court held that the agent's search of the tubular package was reasonable because the agent's search did not go beyond that of the private search, the Supreme Court made it clear that warrantless searches of containers are presumptively unreasonable. *Id.* at 1657.

> Ware should have obtained a search warrant before cutting open the tubular package that contained cocaine. Ware had probable cause to obtain a search warrant based on his observations and on the results of the sniff test by the narcotics detection dog. Because Ware had dominion and control over the package, there was little change of loss or destruction of the package. There were *no exigent circumstances that justified opening the package before obtaining a search warrant*. *Id.* at 214 (emphasis added).

Thus, any "frisk" of the defendants where containers (i.e., the smalal zippered purse in the pocket containing allegedly the two small vials) were opened or any containers that were "opened" in the vehicle are suspect and unless justified by law, the fruits thereof, including the items themselves should have been suppressed as evidence.

Assuming that the stopping of the vehicle was lawful and assuming *arguendo* that the detention and pat-down was lawful, the officers did not have permission to open the container found in the pocket of the shorts of the defendant Bates upon pat-down after he was ordered from the vehicle. Perhaps ordering the driver, if stopped for a pretended traffic violation, was not an impermissible seizure. Perhaps a frisk upon observing an alleged bulge in the shorts was (also) justified. But there was no justification under the Constitution of the United States as well as the Constitution of the State of Arkansas to actually unzip the two inch by three inch pouch and search its contents. The officer could only search "reasonably" for a firearm: "pat down". [Elephants don't hide in closets and firearms are not contained in 2 x 3 inch zippered pouches!!]

The appellant below relied upon *Brunson v. State*, 925 S.W.2d 434 (Ark. 1996); however. as pointed out by the trial judge below, the Arkansas Supreme Court, March 17, 1997, reversed this Arkansas Court of Appeals decision. Also (below) His Honor cited *Wright v. State*, 300 Ark. 259 (1989) as authority for the denial of the motion to suppress. *Wright* had held that a limited search incident to a lawful stop must at times be performed expeditiously, holding that drugs found as a result of a frisk during an investigatory stop was admissible. Nevertheless, despite our contention the stop was not "lawful," nor the detention, nor the "pat-down," we submit that the recent decision *Stewart v. Arkansas*, CA CR 97-236, decided October 15, 1997, is directly in point and ample authority to hold the seizure unlawful under the Fourth Amendment. In reversing a Pulaski County Circuit Court, *Stewart* held that "...after this protective search, the officer went beyond mere protection" holding

> We see nothing in the record to suggest that the matchbox taken from appellant's pocket contained a weapon or posed a risk to the officer's safety. Even if this is a high-crime area, without some evidence other than suspicion or a hunch that a matchbox contains a controlled substance, it is patently inappropriate for an officer, under the guise of maintaining his or others' safety, to take a matchbox and open it. This was not a search incident to arrest. A protective search must be no more invasive than is necessary to ensure the officer's safety; looking inside the matchbox ensured no more safety to the officer.

As the United States Supreme Court in *Terry* stated:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Terry, 392 U.S. at 9, citing *Union Pacific Railroad Co. v. Botsford*, 141 U.S. 250 (1891). The Court went on to state:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

[citing *Terry*, 392 U.S. at 15]

For this, if no other reason, the search below fails and the *conviction* should be set aside. The officer had no authority to open the small zippered pouch in the front pocket of Bates's *shorts*. [He was wearing shorts.] Pat him down -- yes (maybe). But not to unzip the small pouch containing the small vials!! See, also, *United States v. Millan*, 912 F.2d 1014 (8th Cir. 1990). The conviction in *Millan* was reversed because evidence was obtained from an unlawful search of a jacket and a garment bag. The belief that jacket pockets contained narcotics was "too slender a reed" to justify even

the seizure of the person. *Id.* The initial seizure was held unlawful.

> Our society will survive if some criminals go free, but it will not survive if the very principles upon which our society is founded are undermined and broken. It is desirable that criminals be caught. It is necessary that a large percentage of them be caught. But it is far more important that in pursuing criminals the Constitution itself not be violated. Our society can tolerate only a very little of that. If the police officer in his zeal to catch the criminal violates the Constitution and thus himself ceases to be governed by laws and a Constitution, it becomes a society governed by the decisions of individual police officers in the pursuit of crime. In that kind of society the police constitute the power, and they are feared. It is not a free society.
>
> Sokol, *The Law-Abiding Policeman*,
>
> 9-10 (1969)

Judges are the keepers of the sacred flame, the enforcers of the values written into the Bill of Rights by its framers. The Fourth Amendment demands of law enforcement good things like warrants, probable cause, exigency, and police good faith. They all, however, are but the subcriteria by which we measure something else: reasonableness. For Fourth Amendment purposes, the police have to be reasonable when they search and when they seize because the Fourth Amendment demands it.

> THIS CASE ALSO PRESENTS AN IMPORTANT QUESTION OF LAW AS TO WHETHER THE EVIDENCE WAS SUFFICIENT TO SUSTAIN

CONVICTIONS UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

The proof at trial failed because of insufficient evidence as to (a) the chain of custody to authenticate the alleged controlled substance methamphetamine and/or (b) that this substance was a useable amount. In essence, there was insufficient evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979) and therefore there was a violation of Fifth Amendment Due Process.

The chain-of-custody objection was a valid objection because the principal of fundamental fairness is necessarily defined and shaped by the rules of evidence. *United States v. Delano*, 825 F.Supp. 534, 545 (W.D.NY 1993) The United States Supreme Court has long held that "(e)stablished rules of ... evidence [are] designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also *United States v. Blumberg*, 961 F.2d 787, 789 (8th Cir. 1992). Accordingly, it is a "fundamental premise of any trial that the ultimate decision rests solely upon evidence presented by the parties *within the confines of the rules of evidence*." *Scott v. Ohio*, 480 U.S. 923, 925 (1987) (emphasis added).

A necessary part of laying a foundation, to meet the "chain of custody" requirement, means showing an unbroken chain of possession of the item prior to its introduction as an exhibit. If the arresting officer (for example) directs the defendant to give a blood sample pursuant to statute, the chain of custody is satisfied if the testifying arresting officer is shown the vial of blood, testifies that he saw it drawn at the hospital or station by the registered nurse, initialed and dated that sample, delivered it to the lab, received it and the results

back from the lab, and kept it in a *locked* evidence storage receptacle until trial. The vial(s) (and the test results) as evidence against John Michael Bates did not meet the chain of custody requirements.[2]

In *State v. Johnson*, 673 S.W.2d 877 (Tenn. Cr. App. 1984), the Tennessee Court of Criminal Appeals held that the purpose of a chain is to "prove the identity of a substance offered in evidence and its integrity, that is, that there was no substantial alteration in the article offered which would affect its validity as evidence."

A. *The standard of review as established by the Fifth Amendment Due Process Clause.*

In *Jackson v. Virginia*, *supra*, this Supreme Court said that to review on habeas corpus state convictions under the Fourteenth Amendment the standard was:

> No rational trier of fact could reasonably conclude guilt beyond a reasonable doubt.

Jackson v. Virginia, *supra* held:

> After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.
>
> ...This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve

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[2]. There is one type of evidence where chain of custody is not required. These are objects which can be readily identified, even by a lay person. An example of this type of evidence is a blind person's cane found at the scene of an accident.

conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

In re Winship, 397 U.S. 358 (1970) had established that the Fourteenth Amendment Due Process Clause prohibits criminal conviction except upon proof beyond a reasonable doubt. The Opinion of the Arkansas Court of Appeals of September 23, 1998, Opinion, Appendix A, affirming the conviction, overlooked, or misapprehended the standard of review applicable to such conviction by virtue of the United States Supreme Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1997).

THE CHAIN OF CUSTODY ERROR

Over Bates's objection, the trial court introduced into evidence the alleged controlled substance, point four four eight nine (.4489) grams of methamphetamine, without requiring the State to properly authenticate the substance by proving the necessary links in the chain of custody. Bates did not waive the requirement of authenticity. Rule 901, Ark. R. Evid., requires:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Under the specific facts of this case, the chain of custody was insufficient because there was evidence the methamphetamine introduced at court was not the same alleged substance taken from Bates.

In Arkansas the courts have routinely stated that the proof of chain of custody for interchangeable items like drugs or blood, needs to be more conclusive. *Lee v. State*, 931

S.W.2d 433 (1996); *Gardner v. State*, 754 S.W.2d 518 (1988); and *Brewer v. State*, 551 S.W.2d 218 (1997). The purpose of establishing chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. *Lee v. State*, *supra*. Bates's counsel acknowledged that minor uncertainties in the proof in the chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence admissible as a matter of law. See *Gardner v. State*, *supra*. The missing link in the chain of custody was substantial.

Deputy Estes on August 4, 1996, at approximately 2:00 a.m. allegedly retrieved from Bates's front, left, shorts pocket a zippered pouch, which contained two brown vials. The two brown vials allegedly contained a small quantity of methamphetamine. Deputy Evans testified that he recovered the brown vials from Bates's pocket and that he put the evidence in the police locker. R.258 That evidence allegedly stayed in the evidence locker until it was transported to the State Crime Lab in Little Rock, but Estes did not have any knowledge as to how the evidence got to the State Crime Lab. R.260 Chemist Kathy Shanks testified only that an unidentified substance was received in the State Crime Lab in Little Rock which was allegedly hand-carried by Fulton County Sheriff Jack Collins, deceased, prior to trial. Chemist Shanks apparently received two separate samples of methamphetamine. One, which for an unknown reason was not available at trial, contained five point seven two one seven (5.7217) grams of a hard, off-white like substance. [This evidence "disappeared".] This substance allegedly contained sixteen point seven percent (16.7%) methamphetamine hydrochloride. R.169 Again, for an unknown reason, this

substance had "disappeared" and was not available during trial, and, therefore, was not permitted into evidence. The second alleged controlled substance, which was introduced into evidence, consisted of an off-white *powder* (as stated *supra*) weighing a total of point four four eight nine (.4489) grams which contained methamphetamine hydrochloride and the dimethyl sulfone. Chemist Shanks testified that the off-white powder was in one of the brown vials. Chemist shanks did not perform a *quantitative* analysis of the methamphetamine hydrochloride and dimethyl sulfone so she could not testify what percentage of the substance was methamphetamine. R.186

Chemist Shanks could not tell from personal knowledge how these substances were delivered to the Crime Lab nor how the substances were transported from the Crime Lab to the Fulton County Sheriff's Department. (The witness "guessed" the substance was shipped by UPS from the Crime Lab back to the Fulton County Sheriff's Department.) Deputy Estes did not attempt to testify that the substance in Court was the same substance he retrieved from Bates. Further, Deputy Estes could not explain the missing substance. Deputy Estes described the substance originally as granular, and not as a powder. R.272

As authority, Bates relied below upon two significant recent Arkansas Supreme Court cases, namely: *Crisco v. State*, 843 S.W.2d 582 (1997) and *White v. State*, 330 Ark. 813, ____ S.W.2d ___ (1997). The fact that the controlled substance "changed" from granular to powder is significant. More significant is the fact that five point seven two one seven (5.7217) grams of the controlled substance "disappeared" and was unaccounted for without any

explanation. Even more significant were the missing links in the chain of custody. Sheriff Jack Collins who allegedly hand delivered the substance from the Fulton County evidence locker to the State Crime Lab (no proof) was unavailable (deceased) and did not testify. The controlled substance "changed" from an off-white granular substance to an off-white powder. These factors together certainly create a significant possibility that the evidence tested was not the same as that allegedly taken by Fulton County officers from Michael Bates.

Bates testified and denied possessing any controlled substance. The facts were squarely on point with the facts in *Crisco v. State* and *White v. State*, *supra*. The alleged controlled substance simply should not have been admitted into evidence and, therefore, the proof fails. (The Opinion (Appendix A) reached erroneous conclusions and is in error.

Civil cases follow a different rule.[3]

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[3]. In *Government Suppliers Consolidating Services, Inc. v. Bayh, Governor of Indiana*, 753 F.Supp. 739 (S.D.In. 1990), trash brokers brought a suit challenging statutes regulating the importation and disposal of trash in Indiana. The plaintiff in that cause presented evidence of medical waste found at what was an otherwise sanitary land field. An objection was raised as to the "insufficient chain of custody" and the Court overruled the objections stating that "[w]hile it is clear that the defendant did not present a complete chain of custody , the case establishes that any breaks on the chain of custody impact the weight of the evidence and not its admissibility, as long as the Court makes threshold determination that such evidence has not been changed in any important respect." 753 F.Supp. at 772, n.40, citing *Hoover v. Thompson*, 787 F.2d 449, 450-51 (8th Cir. 1986); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1154-55 (5th Cir. 1981); Note, Admission of Demonstrative Evidence, 61 Northwest U. Law Rev.

THE FULTON COUNTY, ARKANSAS, TRIAL COURT ALSO ERRED BY NOT REQUIRING THE STATE TO PROVE THE ALLEGED CONTROLLED SUBSTANCE CONTAINED A USABLE AMOUNT OF METHAMPHETAMINE

Bates at the conclusion of the State's evidence and at the conclusion of all the evidence properly moved (insufficient evidence) to dismiss the charges also because the State of Arkansas did not prove Bates possessed a usable amount of methamphetamine. Specifically, the only substance introduced at the trial was point four four eight nine (.4489) grams of an off-white powder substance that allegedly contained methamphetamine hydrochloride and dimethyl sulfone. R.179 Chemist Shanks, as stated *supra*, did not perform a *quantitative* analysis to determine which portion of the powder substance was methamphetamine hydrochloride or dimethyl sulfone. R.186 Chemist Shanks testified she was

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472, 477-79 (1966) (discussing the relaxed chain of custody requirement in state court civil cases). The court's opinion in *Government Suppliers* goes on to note that a "trial court is also entitled to assume that public officials who had custody of evidence did not tamper with the evidence." 753 F.Supp. at 772, citing *Williams v. Butler*, 746 F.2d 431, 442 (8th Cir. 1984). Finally, the court concluded that there was "no hint that the [government] defendant and his agency did anything to compromise the authenticity of the proffered evidence." 753 F.Supp. at 772. See also, *United States v. Henderson*, 588 F.2d 157, 160 (5th Cir. 1979), *cert. denied*, 440 U.S. 975 (1979) (it is "firmly established" that the question of whether the proponent of evidence has proved inadequate chain of custody goes to the weight rather than the admissibility of evidence, and is thus reserved for the trier of fact); *United States v. Lane*, 591 F.2d 961 (D.C. Cir. 1979).

not aware of any *taste* test for methamphetamine. She testified she could not *see* methamphetamine hydrochloride without some type of laboratory test. She further testified she could not testify what it would take to be classified as a usable amount of methamphetamine.

The Arkansas Supreme Court held in *Harbison v. State*, 790 S.W.2d 146 (1990), that in simple possession of controlled substance cases it is not illegal to possess less than a usable amount of a controlled substance primarily because legislators did not intend to criminalize less than a usable amount. The Opinion, Appendix A, reached another erroneous conclusion as to *Harbison*. Less than a usable amount cannot contribute to future conduct at which the legislation is aimed and which is use of trafficking in drugs. It is also a matter of constitutional Due Process. Bates was convicted of possessing *methamphetamine*. The drugs were allegedly found in a zippered pouch in his front pocket.

The State failed to offer any evidence whatsoever to prove beyond a reasonable doubt that the portion of the white powdery substance identified as methamphetamine was (1) sufficient to permit knowledge of its presence without the need for scientific identification, or (2) sufficient to be usable in the manner in which such a substance is ordinarily used. Therefore, the conviction of possessing methamphetamine should also be set aside under *Jackson v. Virginia*, *supra*, because of this insufficient evidence.

The United States Supreme Court in *In re Winship*, *supra*, held that the United States Constitution prohibits criminal conviction except upon proof beyond a reasonable doubt. [The constitutional standard in federal and state cases is obviously the same.]

The standard of review for sufficiency of the evidence is that the court must view the evidence as to whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. See, again, for example, *United States v. Warren*, 18 F.3d 602 (8th Cir. 1994), where the Eighth Circuit (for example) holds that the court must affirm a conviction unless it concludes "that a reasonable fact finder could not have found guilt beyond a reasonable doubt." See, also, *United States v. Ortiz*, 23 F.3d 21 (1st Cir. 1994); *United States v. D'Amato*, 39 F.3d 1249 (2d Cir. 1994); *United States v. Pettigrew*, 77 F.3d 1500 (5th Cir. 1996); *Bergman v. McCaughtry*, 65 F.3d 1371 (7th Cir. 1995); and *United States v. Edmonds*, 103 F.3d 822, 824-25 (9th Cir. 1996).

We do not object to the review of the evidence and the inferences that may reasonably be drawn "in the light most favorable to the verdict." But we do object to a conviction where there is (1) a substantial break in the chain of custody, even if the substance is held admissible, and (2) it is not a "usable" amount.

C. *Brief Historical Review of Background and Roots of Modern Standard of Review*

> ....This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflict in the testimony, to weigh the evidence, and to draw reasonable inferences from basis facts to ultimate facts.
>
> *Jackson v. Virginia*,
> 443 U.S. 307 (1979)

The idea of protecting the accused can be traced back at least two thousand years having been recognized long before it was enshrined in English common law. The Roman Emperor Trajan (52-117) pronounced "it was better to let the

crime of a guilty person go unpunished than to condemn the innocent" according to the Digest of Justinian. *Coffin v. United States*, 156 U.S. 432, 454 (1895); Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, The Lawyers Co-operative Pub. Co. 692 (1938) It was a maxim of Roman law that where there was a conflict in evidence the most favorable construction to the accused should be adopted.[4] "In all cases of doubt, the most merciful construction of facts should be preferred," *Coffin*, *id.*; Burdick, 692-693.

In mid-15th century England, Chief Justice Fortescue expressed the great principle: "Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally. *Coffin*, 156 U.S. at 455.

A century and a half later even the notorious Star Chamber professed to honor the principle that "it were better to acquit twenty that are guilty than condemn one Innocent." Levy, *Origins of the Fifth Amendment* 33 (1968) The relative humanity of the English judges was in marked contrast to the inquisitorial system in use on the continent. It was said, for example, of an inquisitor of the French royal court that he

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[4]. The Romans may have had a standard of proof in criminal cases even higher than beyond reasonable doubt. It was said that:

> All accusers should know that no criminal charge should be brought unless it can be supported by competent witnesses, or established by the most convincing documents, or shown by circumstantial evidence *clearer than daylight* resulting in undoubted proof.

conducted himself as if "sacrifice of a hundred innocent men were better than the escape of one guilty." Id. at 32. In fairness to the French, however, Voltaire iterated the great principle two decades prior to the publication of Blackstone's Commentaries.[5] See *Zadig*, ch. 6 (1747), "It is better to risk saving a guilty person than to condemn an innocent one," quoted in *Bartlett's Familiar Quotations* (14th ed. 1968), p.417a.

The principle that it is better that ten guilty escape than one innocent suffer became embedded into the English law as bedrock and was carried to the American colonies where it was received in a climate of liberty.

The presumption of innocence is not expressly set forth in the Constitution, but by the middle of the nineteenth century it was well established in the states that it was mandatory to instruct jurors on the presumption or it was reversible error. *McCormick*, Evidence 962-968 (3d ed. 1984); see also *Coffin*, 156 U.S. at 457-458. It was a universal practice.

In *Coffin* the Court embarked on a scholarly exegesis of the historical origins of the presumption and concluded unanimously that the presumption was basic to a fair trial and

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[5]. Blackstone, *Commentaries on the Laws of England*, 352 (1769 ed.), republished The Legal Classics Library (1983). *Coffin*, 156 U.S. at 456. *Coffin* also quoted Lord Hale (1678) that "it is better five guilty persons should escape unpunished than one innocent person should die." "It is better that ten guilty persons escape, than that one innocent suffer." Sir William Blackstone (1723-80), *Commentaries on the Laws of England*, 15th edn, 1809, vol. 4, p.358. "It is better to risk saving a guilty person than to condemn an innocent one." Voltaire (1694-1778), *Zadig*, 1747

reversal for failure to instruct. 156 U.S. at 453-461 *Coffin* also engages in an enlightening explanation of the distinction between the presumption of innocence and reasonable doubt: "one is a cause, the other an effect." 156 U.S. at 460 The presumption of innocence is in the nature of evidence in favor of the accused. 156 U.S. at 459-460. *Taylor v. Kentucky*, 936 U.S. 478 (1978) held that the presumption of innocence was guaranteed as an instruction by due process. See, also, *United States v. Romano*, 382 U.S. 136 (1965); *Tot v. United States*, 319 U.S. 463 (1943); and *McFarland v. American Sugar Rfg. Co.*, 241 U.S. 79 (1916). See *Leland v. Oregon*, 343 U.S. 790, 799 (1952).

The Due Process Clause precludes states from discarding the presumption of innocence. *McMillan v. Pennsylvania*, 106 S.Ct. 2411, 2417 (1986); *Patterson v. New York*, 432 U.S. 197, 210 (1977)

REASONABLE DOUBT

The concept of proof beyond a reasonable doubt was established at common law before the adoption of the Sixth Amendment. As with the presumption of innocence, the states took the lead in requiring proof beyond a reasonable doubt. See *In Re Winship*, 397 U.S. 358, 372 (1970) (Justice Harlan) McCormick, *Evidence* 962-963 (3d ed 1984).

> The Constitution does not mention... the presumption of innocence nor does it say that guilt must be proven beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue.

Johnson v. Louisiana, 406 U.S. at 381 (Douglas, J., dissenting)

Mr. Justice Douglas refers, of course, to *In re Winship*, 397 U.S. 358 (1970).

Justice Brennan began his analysis in *Winship* by expressing the Court's concern for the inevitability of error in decision-making. He quoted from his earlier opinion for the Court in *Speiser v. Randall*, 357 U.S. 513, 525 (1958). "There is always in litigation a margin of error, representing error in fact-finding...." The reasonable doubt standard (he said) "is a prime instrument for reducing the risks of convictions resting on factual error." 397 U.S. at 363. Justice Brennan then expressed the importance of certainty in decision-making to three groups: (1) the triers of fact, (2) society as a whole and (3) criminal defendants, and concluded as to each that the reasonable doubt standard was indispensable. As to the trier of fact, "the reasonable doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" 397 U.S. at 364. As to the general citizenry, "use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 364. As to those suspected and accused, "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal

offense without convincing a proper fact-finder of his guilt with utmost certainty." *Id.*

As a result of *Winship*, the burden of proof always rests upon the prosecution. It never shifts. *Mullaney v. Wilbur*, 421 U.S. 684 (1975) See, also, *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Yates v. Evatt*, 500 U.S. 391 (1991). Moreover, as a result of *Winship* and *Jackson v. Virginia*, 443 U.S. 307, 321, n.14 (1979), there has been a revolution in the appellate courts in evaluating the sufficiency of evidence to sustain convictions. 443 U.S. at 307. Although nominally setting a review standard for federal *habeas corpus* review, the standard established in *Jackson* has been generally applied to all sufficiency of evidence claims on appeal. The standard flows directly from *Winship* and in fact was seen by the *Jackson* Court to be a necessary complement to *Winship*. 443 U.S. at 313-318 The standard for appellate review of insufficiency of evidence claims set forth in *Jackson* is: a criminal conviction cannot be sustained if, on review of the trial record in the light most favorable to the prosecution, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt. 443 U.S. at 324.

In conclusion, due process of law today as yesterday requires that in a criminal proceeding the state prove "beyond a reasonable doubt... every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship*, 397 U.S. 358 (1970); see also, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). A conviction founded on less than sufficient proof of every element of the charged offense violates the accused's right to due process of law and thus cannot stand. *Jackson v. Virginia*, 443 U.S. 307 (1979). In reviewing the

sufficiency of the evidence, the appellate court must take the evidence in the light most favorable to the State and grant the State all reasonable inferences from the evidence. The state must nonetheless prove all requisite facts. Inferences are permitted, but presuming the existence of an element of a crime is not permitted; guilt must be proved. *Francis v. Franklin*, 471 U.S. 307 (1985)

Due process requires that a criminal defendant convicted on less than sufficient evidence be discharged. *Osborne v. Ohio*, 495 U.S. 103 (1990). This case must be reversed and John Michael Bates discharged.

CONCLUSION

For the foregoing reasons, Petitioner John Michael Bates requests that this Court grant certiorari.

Respectfully submitted,

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APPENDIX A

ARKANSAS COURT OF APPEALS

ARKANSAS COURT OF APPEALS

CACR 98-166

September 23, 1998

	Opinion Delivered
JOHN MICHAEL BATES APPELLANT	APPEAL FROM FULTON COUNTY CIRCUIT COURT
VS.	
STATE OF ARKANSAS APPELLEE	HONORABLE JOHN DAN KEMP, CIRCUIT JUDGE AFFIRMED

JOHN E. JENNINGS, Judge

John Michael Bates was found guilty by a Fulton County jury of possession of methamphetamine and was sentenced to five years' probation. He argues four points on appeal: (1) that the trial court erred in refusing to grant his motion to suppress evidence seized in violation of his Fourth Amendment rights; (2) that the trial court erred by allowing introduction of evidence when the State failed to establish its authenticity by showing a proper chain of custody; (3) that the trial court erred by not requiring the State to prove that the methamphetamine was a "usable amount; and (4) the trial court erred in sentencing appellant to probation rather than a fine. We disagree and affirm.

Appellant's first argument is that the trial court erred in denying his motion to suppress. In reviewing the trial court's denial of a motion to suppress, we make an independent determination based on the totality of the

circumstances, and reverse only if the trial court's ruling was clearly against a preponderance of the evidence. Welch v. State, 330 Ark. 158, 955 S.W. 2d 181 (1997).

The Fulton County Sheriff's Department had information from various sources indicating that the appellant was involved in drug trafficking. When officers learned that the appellant and his wife had rented a house in Vida, they set up "loose surveillance" of the house. Around 2:00 a.m. on August 4, 1996, a deputy noticed a large U-Haul truck backed up to the house. He notified other officers, who became suspicious of possible drug-related activity. Believing the truck might contain meth-amphetamine, the officers resolved to stop the truck when it pulled away from the house and they noticed that one of the headlights was burned out.

Officers stopped the truck three quarters of a mile from the house. The driver, appellant, stepped out. Remaining in the cab were appellant's wife and an individual, Delanie Berg, who officers knew had previous arrests on methamphetamine and firearms charges. The appellant was taken to the rear of the truck where he was frisked. Officers removed the two other passenger from the cab and found a semi-automatic pistol beneath the passenger seat.

As appellant was escorted to the rear of the truck, officers noticed "bulges" in his pockets. Appellant was told to place his hands on the patrol car. Deputy Estes "patted down" appellant, removing the contents of appellant's pockets and placing the items found on the hood of the patrol car. These included a small gray zippered pouch or bag. The appellant was handcuffed, and the deputy opened the small bag. The appellant was then arrested for

possession of a controlled substance.

The appellant argues that the stopping of the truck was unlawful, that the "detention" and pat-down search of the appellant were unlawful, and that the officers had no justification for opening the zippered pouch found in his pocket. We disagree.

It is well-settled that a police officer may stop and detain a motorist where the officer has probable cause to believe that a traffic violation has occurred. Travis v. State, 331 Ark. 7, 959 S.W.2d 32 (1998). Here, the officers observed appellant driving a truck with a burned-out headlight. If a reasonable officer would have made such a traffic stop, the officers' ulterior motives do not render the stop invalid. See, e.g., Mings v. State, 318 Ark. 201, 884 S.W.2d 596 (1994); Brown v. State, 54 Ark. App. 44, 924 S.W. 2d 251 (1996); Miller v. State, 44 Ark. App. 112, 868 S.W. 2d 510 (1993), cert. denied, 114 S. Ct. 2137 (1994). An officer making a traffic stop may order the occupants out of the vehicle. Wright v. State, 327 Ark. 558, 940 S.W.2d 432 (1997). If facts available to the officer would warrant a person of reasonable caution to believe that a limited search for weapons was appropriate, the officer may search an individual's outer clothing and immediate vicinity. Shaver v. State, 332 Ark. 13, 963 S.W.2d 598 (1998). However, if the officer has probable cause to arrest, he may conduct a search incident to that arrest before the arrest is actually made, provided the search and arrest are substantially contemporaneous. Brunson v. State, 327 Ark. 567, 940 S.W2d 440 (1997). A search of similar scope, including the person and areas within his immediate control, as that incident to an arrest, may be made even if the officer's decision is to issue a citation in lieu of an arrest, as

a citation is equivalent to a custodial arrest for authority to search purposes under Arkansas Rule of Criminal Procedure 5.5. State v. Earl, 333 Ark. 489, ____ S.W.2d ____(1998); Kimery v. State, ____ Ark. App. ____, ____ S.W.2d ____ (Sept. 9, 1998). In light of this authority, the stop and search were valid and the trial court did not err in denying appellant's motion to suppress.

The appellant next argues that the trial court erred by allowing into evidence the methamphetamine found in his pocket because the State had not shown a sufficient chain of custody. At trial, Deputy Estes testified that he took the evidence recovered from appellant to the police locker. He wrote a receipt for the items taken from appellant. His written description described the two brown vials as containing a "granular" substance. He testified that it is "routine procedure" for the person who takes evidence from the locker to transport it to the state crime lab. He identified the items placed in evidence as those removed from appellant's pocket. Kathy Shanks, a forensic chemist with the state crime laboratory, testified regarding standard operating procedure for the lab's receipt of evidence and the preparation of a submission sheet. The submission sheet indicated that the evidence had been hand carried to the lab by Sheriff Jack Collins. Included in that evidence were the two brown vials containing an "off-white powder" which tested positive for methamphetamine. She testified that her heat seal of the evidence bag was intact in court when she opened the bag, and that the items in the bag, including the brown vials, bore her initials, the case number, and the date upon which she opened the case.

The appellant argues that the State's chain of custody is insufficient because Sheriff Collins, being

deceased, was unavailable to testify regarding his delivery of the evidence to the lab. Appellant also argues that the discrepancies between the deputy's description of a "granular" substance and the chemist's description of a "powder" raise a "significant possibility" that the evidence tested was not the same as that taken from appellant. We disagree.

> As the supreme court has recently reiterated:
> The purpose of establishing chain of custody is to prevent the introduction of evidence that has been tampered with or is not authentic. Newman v. State, 327 Ark. 339, 939 S.W.2d 811 (1997); Lee v. State, 326 Ark. 229, 931 S.W.2d 433 (1996); Harris v. State, 322 Ark. 167, 907 S.W.2d 729 (1995). See also Ark. R. Evid. 901. The trial court must be satisfied within a reasonable probability that the evidence has not been tampered with, but it is not necessary for the State to eliminate every possibility of tampering. Newman v. State, supra; Lee v. State, supra; Harris v. State, supra; Gardner v. State, 296 Ark. 41, 754 S.W.2d 518 (1988). Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render the evidence inadmissable as a matter of law. Gardner v. State, supra; Nash v. State, 267 Ark. 870, 591 S.W.2d 670 (Ark. App. 1979). We have stated that the proof of the chain of custody for interchangeable items like drugs or blood

needs to be more conclusive. Lee v. State, supra; Gardner v. State, supra; Brewer v. State, 261 Ark. 732, 551 S.W.2d 218 (1977).

Crisco v. State, 328 Ark. 388, 943 S.W.2d 58.2 (1997). We cannot say that the trial court abused its discretion in admitting this evidence. The appellant argues that the trial court erred by not requiring the State to prove that he possessed a "usable amount" of methamphetamine. The two vials contained 0.4489 grams of methamphetamine hydrochloride mixed with dimethyl sulfone, a cutting agent. Appellant argues that, because the chemist could not testify what percentage of the mixture in the vials was methamphetamine, the State failed to show that he possessed a "usable amount" pursuant to Harbison v. State, 302 Ark. 315, 790 S.W.2d 146 (1990). We disagree.

Harbison dealt with a "trace amount" of cocaine residue too small to weigh with state crime laboratory equipment. The case at bar is more like that of Sinks v. State, 44 Ark. App. 1, 864 S.W.2d 879 (1993), where we held that an amount of controlled substance that was capable of quantative analysis, could be seen with the naked eye, was tangible and could be picked up, was clearly a measurable amount that satisfied the requirements of Harbison. Here, appellant possessed more than twice the amount of methamphetamine by aggregate weight, including adulterants or diluents, necessary to raise the presumption that one possesses a stimulant drug with intent to deliver. See Ark. Code Ann. § 5-64-40 (a) (1) (i) and (d) (Repl. 1997). The supreme court has stated that a vial containing 100 milligrams of methamphetamine seized from an appellant's person would support a conviction for

possession of a controlled substance even in light of a Harbison challenge. See Moore v. State, 304 Ark. 257, 801 S.W.2d 638 (1990). Here, the methamphetamine was found along with drug paraphernalia with which it could have been ingested. There was substantial evidence from which the jury could find that appellant possessed a usable amount of methamphetamine.

Appellant's final argument concerns sentencing. The jury was instructed to complete three separate verdict forms. The first form, concerning possession of methamphetamine, allowed the jury to impose a term of three to ten years in the Arkansas Department of Correction, or a fine not exceeding $10,000.00, or both a term of imprisonment and a fine. The jury completed that form indicating a fine of $10,000.00 with no term of imprisonment. A second verdict form, concerning possession of marijuana, is not at issue on appeal. The third verdict form, drafted pursuant to AMCI 2d 9111, permitted the jury to make a recommendation as to an alternative sentence as allowed by Ark. Code Ann. § 16-97-101(4) (Supp. 1997). The jury completed that form, recommending a five-year period of probation. At a subsequent sentencing hearing, the trial judge placed appellant on five years' probation.

Appellant argues that, because the jury's recommendation of probation is not binding on the court, appellant can, at his own election, reject the option of probation if the trial court's terms and conditions of probation are not to his liking. He argues that the court cannot impose terms and conditions of probation "too onerous" or appellant "can simply reject same." He argues that, prior to sentencing, he elected not to be placed on

probation but instead to be subjected to the jury's fine, and that the court abused its discretion and exceeded its authority by imposing probation. We disagree.

The bifurcated sentencing statute, Ark. Code Ann. § 16-97-101, provides that the trial court may, in its discretion, instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify and that the jury may, in its discretion, make a recommendation regarding an alternative sentence which shall not be binding on the trial court. Appellant requested such an instruction, and it was given. Arkansas Code Annotated section 16-93-1206(b) (1) (Supp. 1997) provides that one such alternative is probation pursuant to Ark. Code Ann. §§ 5-4-104 - 5-4-311. While it is clear that the jury may recommend probation, the actual assessment of probation lies within the sound discretion of the trial court. Higgins v. State, 326 Ark. 1030, 936 S.W.2d 740 (1996). Appellant has cited no authority, and we are aware of none, that fetters the trial court's discretion by allowing a defendant to dictate the terms and conditions under which he will acquiesce to the court's imposition of a statutorily authorized alternative sentence. Although appellant asserts that the conditions of his probation are "numerous and onerous," he raised no more specific issues concerning the conditions contained in the order of probation either before the trial court or on appeal. See Higgins v. State, 326 Ark. 1030, 936 S.W.2d 740 (1996) (issues concerning conditions of probation not raised before the trial court will not be considered for the first time on appeal). We find no abuse of discretion in the trial court's imposition of probation.

Affirmed.

PITTMAN and AREY, JJ., agree.

APPENDIX B

UNITED STATES CONSTITUTION
AMENDMENT IV

AMENDMENT IV
CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX C

UNITED STATES CONSTITUTION
AMENDMENT XIV, CLAUSE I

AMENDMENT XIV, CL. I
CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.